No. 85-1589

In The
Supreme Court of the United States
October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY,
a dissolved Montana Corporation,

Respondents.

BRIEF OF RESPONDENTS, VERLA LaPLANTE and EDWARD M. LaPLANTE

Joe Bottomly
Bottomly & Gabriel
#18 Sixth Street North
P.O. Box A
Great Falls, Montana 59403
(406) 727-4050

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a federal district court has diversity jurisdiction over an action prosecuted by a citizen of one state against Indians residing on a reservation located in another state, when a state court in which the federal court is sitting does not have jurisdiction.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

Table of Cases

TABLE OF AUTHORITIES—Continued

Page

Statutes

TABLE OF AUTHORITIES—Continued

I. STATEMENT OF THE CASE

A. Introduction

This case arises from a diversity action filed in the Montana Federal District Court by an Iowa corporation (Iowa Mutual Insurance Compaay) against certain Blackfeet Indians, who reside on the Blackfeet Reservation (Robert Wellman, Ramona Wellman, Craig Wellman and Terry Wellman (Wellmans), Edward LaPlante and Verla LaPlante (LaPlantes)). The Plaintiff is an insurance company (Iowa Mutual). It sought a declaratory judgment that it had no duty to indemnify or defend under insurance policies it had sold to some of the Defendant Indians (Wellmans) and their wholly owned ranch company (Wellman Ranch). Also joined as Defendants in Iowa's declaratory action are the Indian tort victims (LaPlantes), who seek to recover under the insurance policies against the Wellmans in Tribal Court, for an accident occurring on the reservation. The parties agree that a Montana State Court would not have jurisdiction over the action.

B. The Underlying Negligence and Bad Faith Case Pending In Blackfeet Tribal Court

On May 3, 1982 Edward LaPlante was injured in a single vehicle, semi-truck accident on the Blackfeet Indian Reservation, located in northern Montana. Mr. LaPlante was employed at the time of the accident by the Wellmans and their ranch company, which is located within the boundaries of the Blackfeet Indian Reservation. (J.A. 24-5). The owners of the Wellman Ranch Company (the Wellmans), are all Blackfeet Indians residing on the reserva-

tion. Mr. LaPlante and his wife are also Blackfeet Indians residing on the reservation. (J.A. 24). Mr. LaPlante maintains that the accident was the result of his employer's negligence.

Iowa Mutual Insurance Company is the insurer of the Wellman Ranch and its individual Indian owners. Midland Claims Service is an independent insurance adjusting agency, which adjusted Mr. LaPlante's claim for Iowa Mutual. (J.A. 26).

Shortly after Mr. LaPlante was out of the hospital due to his injuries, Mr. LaPlante was contacted at his residence on the reservation by agents of Midland Claims. (J.A. 25). After a number of contacts by telephone, by letter and in person, a settlement could not be reached and Mr. LaPlante and his wife filed a Complaint in Blackfeet Tribal Court. The Complaint stated two causes of action. Count I stated a negligence personal injury action against the Wellman Ranch and its individual Indian owners. Count II alleged a bad faith insurance adjusting claim against Iowa Mutual Insurance Company and Midland Claims. (J.A. 5-9).

As part of its defense, Iowa Mutual answered the Complaint by stating that the LaPlantes' injuries were not covered by any of the insurance policies it had sold to the Wellmans. The LaPlantes moved for a summary judgment on this defense. This motion is presently pending in the Blackfeet Tribal Court, as is the rest of the case.

C. The Present Case: Iowa Mutual's Declaratory Action Seeking Interpretation of the Insurance Policy

Subsequent to the filing of the underlying Tribal Court action, Iowa Mutual filed the present diversity action in Montana Federal District Court. The asserted basis for federal jurisdiction is diversity jurisdiction. Iowa Mutual, however, has admitted that a Montana state court would not have jurisdiction over some or all of the Indian Defendants, and that these Defendants are necessary parties to the declaratory action. (Brief of App. in 9th Cir. p. 5).

The LaPlantes moved to dismiss the declaratory action. (J.A. 10). In an Order dated September 20, 1984 the United States District Court granted LaPlantes' Motion. (App. to Pet., p. 12). It noted that all the named Defendants are members of the Blackfeet Indian Tribe and that the accident at issue occurred on the Blackfeet Indian Reservation. The District Court held that the assertion of diversity jurisdiction in the first instance by the Federal Court was inappropriate. Relying on *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), it held that the present civil controversy arose on the Indian Reservation and, therefore, the Blackfeet Tribal Court must be afforded an opportunity first to determine its own jurisdiction.

Iowa Mutual appealed to the Ninth Circuit. The Ninth Circuit affirmed the District Court's dismissal of Iowa Mutual's declaratory action. (App. to Pet., p. 32). The Circuit Panel concluded that *R.J. Williams* was consistent with the recent U.S. Supreme Court case of *National Farmers Union Insurance Companies v. Crow Tribe of*

Indians, 471 U.S. —, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). The Ninth Circuit Panel held that the existence of tribal court jurisdiction in this instance must be decided in the first instance by the tribal court itself. The Court also noted that where a state court is precluded from hearing a case, a Federal District Court should also be precluded, because the Federal Court, sitting in diversity, operates as an adjunct to the state court.

———o———

II. RELATED ACTIONS

A. Midland Claims and Iowa Mutual's Federal Declaratory Action Seeking Declaration That Tribal Court Does Not Have Jurisdiction Over Them in the LaPlantes' Underlying Bad Faith Claim

Besides the present action, Midland Claims and Iowa Mutual filed a separate action in Federal District Court seeking a declaration that the Blackfeet Tribal Court had no jurisdiction over them in the LaPlantes' underlying bad faith claim. Midland Claims and Iowa Mutual sought an injunction prohibiting the Tribal Court from proceeding further. The LaPlantes as well as the Blackfeet Tribal Court and the Blackfeet Tribe were defendants in that case.

The Federal District Court dismissed Midland's and Iowa Mutual's Complaint for failure to state a federal claim upon which relief could be granted. Midland Claims and Iowa Mutual appealed. Subsequent to this appeal the U.S. Supreme Court handed down its decision in *National Farmers Union.* The Ninth Circuit remanded the appeal to District Court for a determination in light of *National Farmers Union.*

Iowa Mutual, Midland Claims and the LaPlantes cross-moved for summary judgment on the issue of jurisdiction. It was agreed by the parties that the Tribal Court had concluded that it did have jurisdiction over the underlying bad faith case. However, the jurisdiction issue had not yet been presented to the Blackfeet Tribal Court of Appeals. For this reason, in a decision dated March 18, 1986, the District Court dismissed the case without prejudice. The Court directed Iowa Mutual and Midland Claims to exhaust their remedies under tribal law.

———o———

III. SUMMARY OF THE ARGUMENT

A federal district court does not have diversity jurisdiction over a case involving reservation Indians, when a state court does not have jurisdiction over the action. The history of the tribal civil jurisdiction and Congress's clear policy of promoting tribal self-government indicate that Congress did not intend for the general diversity statutes to infringe on tribal self-government. Further, the policies of *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938), to discourage forum shopping and unequal protection of the law, would require that diversity jurisdiction not apply to such cases. To permit diversity jurisdiction would deviate from the historical policy of broad civil tribal jurisdiction and would deny Indians the opportunity to develop their legal systems. The judgment of the Ninth Circuit Court of Appeals should, therefore, be affirmed.

———o———

IV. ARGUMENT

A. TRIBAL CIVIL JURISDICTION

Indian tribes have long been recognized, as "distinct, independent political communities, which are qualified to exercise powers of self-government." *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832); *United States v. Wheeler,* 435 U.S. 313, 322-324 (1978); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 (1978); *National Farmers Union,* 85 L.Ed.2d at 824; *Ex Parte Crow Dog,* 109 U.S. 556 (1883); *Fisher v. Dist. Ct.,* 424 U.S. 382, 386 (1976); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980).

In *Worcester,* the State of Georgia attempted to extend its criminal jurisdiction to reservation lands and remove two white men who lived with the Cherokees with tribal consent. Chief Justice John Marshall analyzed the relationship between tribe with both state and federal governments. He also reviewed the history of the Cherokee Tribe's relations with Great Britain and the United States. He described the Cherokee Nation as a "distinct political community" with the necessary inherent powers of self-gevornment. 31 U.S. (6 Pet.) 515, 561 (1832).

In *Crow Dog,* the Supreme Court recognized the tribes' exclusive criminal jurisdiction over tribal members as a retained aspect of tribal sovereignty. It acknowledged the tribes retained their power of "self-government". This tribal jurisdiction remains with the tribes unless removed by specific legislation or a treaty, or by necessity of its coming under the protection of the United States.

The tribes' sovereignty is, of course, not complete. Their dependent status makes tribes subject to the plenary power of the federal government. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980). *U.S. v. Wheeler,* 435 U.S. at 323. Congress, by treaty or statute, undoubtedly has power to limit tribal powers. Also, in a few areas a tribe's sovereign power may also be implicitly lost by virtue of its incorporation within the United States. For example, the tribes' authority to deal directly with nations other than the United States is limited. See *U.S. v. Wheeler,* 435 U.S. at 326; *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1931).

The precise boundary of tribal power is sometimes difficult to identify because such power is not attributable to any delegation, but rather to the tribe's retained sovereignty. *United States v. Wheeler,* 435 U.S. at 313, 323, 328 (1978). In determining the boundary of a tribe's authority, its retained sovereignty must be examined against the backdrop of Congressional action and intent. *Santa Clara Pueblo,* 436 U.S. at 60; *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973); *White Mountain Apache,* 448 U.S. at 143; *National Farmers Union,* 85 L.Ed.2d at 826.

The history of retained civil tribal power and Congressional action indicates tribes do retain significant and extensive civil powers over disputes affecting important personal property rights of both Indians and non-Indians arising on the reservation. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 65; *Williams v. Lee,* 358 U.S. 217 (1959); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. at 137; *Fisher v. Dist. Ct.,* 424 U.S. at 386-7; see also *Ken-*

nerly v. District Court, 400 U.S. at 423 (1971). A long history of administrative and judicial decisions recognize broad retained civil tribal jurisdiction.

The Executive Branch of the Federal Government has acted on the assumption that Indian tribes may subject non-Indians to civil jurisdiction, at least since the mid-nineteenth century. 7 Op. Att'y Gen. 174 (1855); see also 23 Op. Att'y Gen. 214 (1900), Op. Sol. Int., Oct. 13, 1976. For example, in 1855, Attorney General Cushings concluded that civil jurisdiction remains subject to the local jurisdiction of the tribes. Indicating that Congress had the right to legislate in that regard, he nevertheless wrote:

> "[Congress] has legislated, insofar as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . By all possible rules of construction the inference is clear that the jurisdiction is left to the Chocktaws themselves of civil controversies arising strictly within the Chocktaw Nation." 7 Op. Att'y Gen. 175, 179-181 (1955) cited in *National Farmers Union,* 85 L.Ed.2d at 826.

As noted above, this Court recognized that Tribes retained self-government powers from early in the nineteenth century. *Worcester* (1832); *Crow Dog,* (1883). Congress reacted to some of these decisions by taking jurisdiction of certain criminal matters. For example, in reaction to *Crow Dog,* Congress passed legislation making certain major crimes committed by Indians to be federal offenses. 18 U.S.C. § 1153, 3242 (1967); see *National Farmers Union,* 85 L.Ed. at 825-826; see generally, *Felix S. Cohen's Handbook of Federal Indian Law* 253 (1982) [hereinafter cited as *Cohen*].

However, Congress has never passed similar legislation granting federal courts jurisdiction over civil disputes arising on the reservation. *National Farmers Union,* 85 L.Ed.2d at 826. In fact, when Congress has spoken on the subject, it has repeatedly promoted the policy of encouraging tribal self-government. This policy, under the leadership of Presidents from both parties during the last three decades, found expression in a variety of legislation, (See *White Mountain Apache Tribe,* 448 U.S. at 143 n.10; see generally, *Cohen,* Ch. 2. § F2g (1982).) Examples of the legislation include the following.

In 1968 Congress enacted the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341 (1968). Among other things, that Act strengthened tribal courts through training of Indian judges, minimizing interference by the Federal Bureau of Indian Affairs in tribal litigation, and requiring tribal consent before permitting a state to take jurisdiction over private civil claims arising on the reservation. *Santa Clara Pueblo,* 436 U.S. at 64. The Act also authorized the United States to accept retrocession of all or part of the criminal or civil jurisdiction acquired by a state under previous Public Law 280. See 25 U.S.C. §§ 1321-26 (1968), 28 U.S.C. § 1360 (1953); see generally, *Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 UCLA L. Rev. 535 (1975), *Cohen,* Ch. 2, § F2f (1982).

Other significant legislation included the Indian Self-Determination and the Indian Education Assistance Act of 1975. 25 U.S.C. § 450-450n, 455 (1975). In the former Act, the Congress declared a Congressional commitment to:

> [Maintain] the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy, which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. 25 U.S.C. § 450a(a) (1975).

The Tribal Jurisdiction Act of 1976 granted tribes the right to bring actions in federal courts in cases in which the United States Attorney had declined to act. That Act thereby allowed tribes to protect their interests free of limitations otherwise existing for private litigants. 28 U.S.C. § 1362 (1962). See, e.g., *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 474 (1976).

Also, Congress recently passed a joint resolution designed to protect the social and cultural integrity of Indian people by insuring the policies and procedures of various federal agencies, as they impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging free exercise of religion. 42 U.S.C. § 1996 (1978). See also, H.Rep. No. 1308, 95th Congress, Second Session, 1, (reprinted in 1978), U.S. Code Cong. & Ad. News, 1262, 1263.

In 1974 Congress enacted the Indian Financing Act. The stated goal of that Act was to:

> [provide] capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources. 25 U.S.C. § 1451 (1974). See 25 U.S.C. §§ 1451-53, 1461-69, and 1481-98 (1974).

Thus, Congress has *not* passed legislation which limits the tribes' civil jurisdiction. It has, however, passed considerable legislation promoting the policy of tribal self-government and self-determination. This is the backdrop by which the Congressional intent regarding diversity statutes must be examined.

In recent decisions this Court has recognized the Congressional policy of Indian Self-Government and Self-Determination. In *Fisher,* 424 U.S. at 387, the Supreme Court recognized that the Indian Reorganization Act, 25 U.S.C. § 476 (1970), was specifically intended to encourage Indian tribes to revitalize their self-government. In *Santa Clara Pueblo,* 436 U.S. at 64, the Court observed that the Indian Civil Rights Act manifested a congressional purpose to protect tribal sovereignty and strengthen the Tribal Court systems. See also, *U.S. v. Wheeler,* 435 U.S. at 327. In *White Mountain Apache Tribes,* 448 U.S. at 143, the Court noted a number of Congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.

The Court has, therefore, upheld broad Indian civil authority to regulate and control important personal and property interests of both Indians and non-Indians arising on the reservation. In *Williams v. Lee,* the Supreme Court held the tribal court had exclusive jurisdiction to adjudicate a civil dispute arising on the reservation. The civil dispute arose from a debt incurred by an Indian to the non-Indian merchant on the reservation. The Court held that it was immaterial that the merchant was not an Indian. He was on the reservation and the transaction with the Indian took place there.

More recently, *Kennerly v. District Court,* 400 U.S. 423 (1971) involved essentially the same facts as *Williams.* A debt by an Indian to a non-Indian arose on the reservation. Despite ordinances by the Blackfeet Tribal Council attempting to grant jurisdiction to the state, the state courts had no jurisdiction over the action. The proper jurisdiction was in the tribal court.

In *Fisher v. District Court,* 424 U.S. 382 (1976) the state courts of Montana attempted to assert jurisdiction over a child welfare case in which both the parents and the child were Indians residing on the reservation. The Court held that the state courts did not have jurisdiction over the action because such jurisdiction would infringe upon tribal self-government. Therefore, the exclusive jurisdiction was in the tribal court.

In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) the Supreme Court held that a severance tax imposed on oil and gas removed from the Indian reservation by non-Indians was proper. It held that such power of the tribe was inherent in its sovereign authority to control economic activities on the reservation. 455 U.S. at 127. See also *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980).

As a corollary to this sovereign power, the Supreme Court has recognized that Indian tribes and individuals are generally exempt from state taxation within their own territories. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. —, 85 L.Ed.2d 753 (1985).

It is true that the Supreme Court has recognized that the civil power of tribes is not unlimited. Where no important tribal interests are directly affected, the tribe

may not be able to regulate non-Indians on non-Indian lands even if the conduct occurs within the reservation boundaries. For example, in *Montana v. United States,* 450 U.S. 544 (1981), the Court held that the Crow Tribe lacked inherent civil authority to regulate fishing by non-Indians on non-Indian lands within the reservation boundaries when no important tribal interests were affected. However, the Court in *Montana* nevertheless pointed out that Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians who enter consensual relationships with the tribe or its members through commercial dealings, contracts, leases or other arrangements. 450 U.S. at 565. The Court further indicated the tribe retained inherent power to exercise civil authority over the conduct of non-Indians when that conduct has a direct effect on the tribe's political, economic or health and welfare. 450 U.S. at 566. Thus, it is clear that when the tribe or its members' interests are affected, the tribe retains extensive civil jurisdiction over civil disputes involving tribal territory, tribal members or tribal government.

B. MONTANA STATE COURTS DO NOT HAVE JURISDICTION OF THE PRESENT CASE

Montana state courts do not have jurisdiction in this case. The tribal court properly has jurisdiction over the present action. The dispute involves a commercial transaction with Blackfeet Indians to insure people and property involved in a business located on the reservation. The basis of the present controversy is a traffic accident which occurred on the Blackfeet Indian Reservation. All of the named Defendants are enrolled members of the

Blackfeet Indian Tribe. Iowa Mutual voluntarily availed itself of business opportunities on the reservation with Blackfeet Indians.

The district court, therefore, correctly held that the dispute arose on the reservation. App. to Pet., pp. 12-27. The underlying personal injury and bad faith actions are presently pending in the Blackfeet Court. In that forum, motions to resolve the present dispute are pending before the Tribal Court.

In the present action, Petitioner, Iowa Mutual, has not argued that a State Court has jurisdiction. However, it claims the state or tribal jurisdiction should not impact on the resolution of the diversity jurisdictional issue. (Brief for Petitioner at 12). In its brief to the Ninth Circuit, Iowa Mutual admitted Montana state courts would not have jurisdiction over all or some of the Defendants. (Brief for Appellant in 9th Circuit p. 5). In argument below, Iowa Mutual has also admitted that the District Court properly applied the case of *R.J. Williams Company v. Fort Belknap Housing Authority,* 719 F.2d 979 (9th Cir. 1983), (see App. to Pet., p. 5a). The *R.J. Williams* case involves a business transaction arising on the reservation. The Ninth Circuit held that the federal courts are divested of diversity jurisdiction whenever the dispute involves exercise of a tribe's responsibility for self-government. *Id.* Iowa Mutual has not attempted to distinguish *R.J. Williams.* Rather, it asked the Ninth Circuit, and now this Court, to overrule that case, to allow diversity jurisdiction *despite* the fact that the state court does not have jurisdiction.

Thus, the tribe's jurisdiction of the present dispute does not appear to be at issue. However, Respondents

address the issue here because Iowa Mutual, in its Brief to the U.S. Supreme Court, incorrectly implies that it had no activities on the reservation. It appears to attempt to indicate that Iowa Mutual did nothing more than approve an application by the Wellmans, which was made off the reservation. This statement is not correct. While it is true that Iowa Mutual's agent's office is off the reservation, the commercial relationship has existed with the Wellmans for many years. It was necessary in the application process and the ongoing business relationship for Iowa Mutual's agents to enter the reservation to photograph and inventory a large ranching business. Naturally, Iowa Mutual also accepted premium payments. Subsequently, Iowa Mutual's agents have regularly been back on the reservation in this commercial relationship. Further, there is no question that Iowa Mutual's agents went onto the reservation to adjust the underlying personal injury claim. It is clear Iowa Mutual voluntarily availed itself of transacting insurance business with Blackfeet Indians on the Blackfeet Reservation. Thus, while it does not appear to be a substantial issue in this case, it is, nevertheless, clear that the State Court would not have jurisdiction and the Tribal Court properly has jurisdiction.

C. ALLOWING DIVERSITY JURISDICTION IN THE PRESENT CASE WOULD SUBSTANTIALLY INTERFERE WITH TRIBAL SELF-GOVERNMENT

Diversity jurisdiction would substantially interfere with tribal self-government. Providing a federal forum, when the state court does not have jurisdiction, would in-

terfere with tribal autonomy and self-government. Not only would it interfere with the Tribal Court proceedings presently pending in the present case, and undermine the authority of tribal court institutions, but it would also interfere with the application of substantive Tribal Law.

Petitioner admits that the state court would not have jurisdiction in this case. The reason a state court would not have jurisdiction was articulated in *Williams*. It stated that the "question has always been whether the state action would infringe on the right of reservation Indians to make their own laws and be ruled by them." 358 US at 220. It reasoned:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of tribal courts over Reservation affairs and hence would infringe on the rights of Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there. . . [Citations omitted]. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. 358 U.S. at 223.

Petitioner makes several arguments why diversity jurisdiction as opposed to state jurisdiction, would not interfere with the tribal self-government. It argues that since diversity cases involve out-of-state parties, the actions would not be "typical debt collection cases" found in *Williams and Kennerly*. The Petitioner recites no authority for its broad statement. In point of fact, one can think of innumerable out-of-state parties who could bring debt collection type actions, which could qualify under diversity cases. Large diversified corporations operate and do business in towns and cities on reservations just as they do

in every other area of the United States. Auto financing companies, mortgage companies and insurance companies are just a few parties who could generally readily avail themselves of diversity jurisdiction. Beyond that, however, it does not seem logical that interference with a typical debt collection case is any more palatable than interference with any other civil action which would otherwise qualify for diversity action. If anything, the tribe and its members would have more interest in resolving the larger scale civil suits involving over $10,000.00.

Petitioner also argues that diversity jurisdiction would not negatively impact on tribal court systems because diversity jurisdiction cases would generally involve controversies that would fall outside the jurisdiction of tribal courts. This argument is unpersuasive because it avoids the issue before the Court. If the tribal court does not have jurisdiction, then presumably the state courts and federal courts, if other jurisdictional requirements are present, would *have* jurisdiction. Of course, the acceptance of such jurisdiction would, in that case, not interfere with tribal self-government because the tribal court never had jurisdiction.

However, this is not the issue to be resolved in this case. The Petitioner has admitted that Montana state court does not have jurisdiction in the present case. The issue is whether, this being true, the federal court should take diversity jurisdiction, and infringe on tribal court jurisdiction where a state court could not.

The Petitioner's arguments that diversity jurisdiction would not interfere with tribal self-government are not substantial. The position that private action, otherwise

not maintainable in state courts, should be allowed in diversity cases because they do not interfere with tribal self-government has been severely criticized by commentators as "clearly wrong." *Cohen,* 317 (1982). It would seem inconsistent to hold that state court jurisdiction of such actions would interfere with tribal self-government while federal court jurisdiction would not. The same interference is taking place except in a different forum.

The Supreme Court has recognized that a federal forum is just as disruptive of tribal self-government as state. In *Santa Clara Pueblo,* the Court noted that providing the federal forum for issues arising under 25 U.S.C. § 1302 (1968) (hereinafter cited as ICRA) constitutes an interference with tribal autonomy and self-government. It observed that resolution of a dispute in a foreign forum "cannot help but unsettle a tribal government's ability to maintain authority." 436 U.S. at 60. It stated:

> In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court,* 424 U.S. 382, 387-388 (1976), may "undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves. *Williams v. Lee,* 358 U.S. at 223. 436 U.S. at 59.

This reasoning of the U.S. Supreme Court in *Santa Clara Pueblo* is sound. The interference with tribal court proceedings is readily apparent in the present case. The

original action was filed in tribal court. Motions are presently pending, which would resolve the dispute filed by Iowa Mutual. By granting diversity jurisdiction, the federal court would effectively deny the tribal court the authority to resolve a dispute which is properly before it, or even to determine its own jurisdiction to decide the issue. See *National Farmers Union,* 85 L.Ed.2d at 827. At the very least, the diversity action would create a substantial risk of conflicting adjudications, causing a corresponding decline in the authority of the Tribal Court. See *Fisher,* 424 U.S. at 388.

Beyond the interference with the tribal court's proceedings, however, granting of diversity jurisdiction also interferes with the application of tribal substantive law. If a cause of action arises on the reservation, the general principles of conflicts of law would dictate that the substantive law of the tribes should be applied even if the case is litigated elsewhere. See generally, *Restatement (Second) of Conflicts of Law,* § 6, Comment C, D, F, G, and I, § 10, Comments b & c, § 145, § 188 (1971). However, the Rules of Decision Act, 28 U.S.C., § 1625 (as interpreted in *Erie,*) would appear to indicate that the federal district court should apply the rules of the law of the state in which it sits. If the state law is applied, then state law would apply only to cases where diversity lies. Tribal law would apply to all other cases in which the state court does not have jurisdiction and the tribal court does. This asymmetrical result would violate the spirit of *Erie* with regard to the equal protection of the law for both Indians and non-Indians as well as encourage forum shopping. See *Erie,* 304 U.S. at 74-75. Intense jurisdictional battles would occur if the tribal court substantive

law is different than the state courts. See generally, Grover, *Jurisdiction: Conflicts of Law and the Indian Reservation: Solutions to Problems in Indian Civil Jurisdiction,* 8 Am. Indian L. Rev. 361 (1980); Canby, Jr., *Civil Jurisdiction and the Indian Reservation* (1973), Utah L. Rev. 206.

Even if federal courts did attempt to apply tribal law, it would be difficult for them to do so because of their unfamiliarity with tribal customs and traditions. In *Santa Clara Pueblo,* the U.S. Supreme Court observed that there may be great differences between tribal traditions and those with which the federal courts are more familiar. For this reason, the Court stated, the judiciary should not rush to create federal causes of action on these delicate matters. 436 U.S. at 72 n.32. See also, *U.S. v. Wheeler,* 435 U.S. at 331-32.

Finally, providing a federal forum in diversity would not only undermine the tribal institutions and substantive law, but it would also impose serious financial burdens on the already "financially disadvantaged" tribes. The cost of civil litigation in Federal Courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. *Santa Clara Pueblo,* 436 U.S. at 64-65, n.19.

Thus, the Petitioner's argument that the providing of the foreign forum would not interfere with Indian self-government has no merit. A foreign forum would interfere in the tribal court's authority to resolve disputes arising on the reservations as well as with the application of the substantive law of the tribe.

D. CONGRESS DID NOT INTEND THE DIVERSITY STATUTE TO PROVIDE A FORUM WHICH WOULD INFRINGE ON THE TRIBE'S ABILITY TO GOVERN ITSELF

There is absolutely no evidence that Congress intended the general diversity jurisdiction statute to infringe on the tribe's ability to self-govern. On the contrary, the evidence appears clear that Congress did not intend the diversity statute to apply when state courts would not have jurisdiction.

The diversity of state citizen statute is the oldest general jurisdiction of federal courts over private actions. (*Act of September 24, 1789,* Ch. 20, §§ 11, 12, 1 Stat. 73, 78.) (codified and carried forward at 28 U.S.C. § 1332). There is no indication that Congress intended this ancient statute to invade tribal self-government. On the contrary, as discussed above, Congress has passed a myriad of legislation expressing its policy of promoting tribal self-government. Of particular importance is 25 U.S.C. §§ 1321-1326, which specifically require tribal consent by popular referendum before a state can assume jurisdiction over civil actions arising on the reservation. The policy of this statute is to promote Indian tribal self-government by allowing tribes to make their own laws and be governed by them. There is no evidence that Congress intended diversity jurisdiction to be a means by which to avoid the policy of this statute. See generally, *Cohen,* 317, n.291 (1982).

The rules of statutory construction support this position. As recently discussed by this Court, the "canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and

Indians." *Montana v. Blackfeet,* 85 L.Ed.2d at 759. Ambiguities or doubts in statutes must be construed in favor of Indians. *Montana v. Blackfeet,* 85 L.Ed.2d at 759. When interpreting statutes which may have the effect of infringing on tribal self-government, these statutes must be strictly construed. See generally, *Cohen,* 224 (1982).

These principles have been recently applied by this Court in *Santa Clara Pueblo.* In that case, an Indian woman brought an action in federal court seeking a declaration that an ordinance denying membership to children or female tribal members was invalid under the Indian Civil Rights Act. Although the court observed that it had frequently recognized the "propriety of inferring a federal cause of action for the enforcement of civil rights", 436 U.S. at 61, it nevertheless indicated that the applicable federal statute must be read in light of the backdrop of Indian sovereignty and Congressional intent to promote tribal self-government. 436 U.S. at 60. The Court noted that creating a federal cause of action would plainly be at odds with the Congressional goal of protecting tribal self-government. 436 U.S. at 64. It stated that the Supreme Court had repeatedly recognized that the tribal courts were appropriate forums for exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians, 436 U.S. at 65, and that providing a federal forum would necessarily constitute interference with the tribal autonomy and self-government, 436 U.S. at 59. The Court, therefore, strictly construed the Indian Civil Rights Act to provide a federal forum only in cases of habeas corpus. The court refused to recognize a general declaratory cause of action,

in federal court, for the enforcement of the civil rights articulated by the Act.

Similarly, in *Kennerly,* this Court strictly construed the necessary requirements by which a state could assume civil jurisdiction of disputes arising on the reservation under 25 U.S.C. §§ 1321-1326 (1968). In that case, although the tribe, by ordinance, had attempted to grant concurrent jurisdiction to the state, the Court held that the state court had no jurisdiction because the state legislature had failed to pass affirmative legislation with respect to jurisdiction over that reservation and the tribe had not put the issue to a vote of the adult enrolled Indians.

Thus, when construing legislation which provides state or federal forums, which could infringe upon tribal self-government, this Court has construed the statutes narrowly against the assumption of state or federal jurisdiction. See also *Bryan v. Itasca County,* 426 U.S. 373 (1976).

Even where this Court has recognized a federal cause of action, it has deferred to the Tribal Court, at least in the first instance, to determine its own jurisdiction. In *National Farmers Union,* the Supreme Court recognized a federal cause of action under 28 U.S.C. § 1331, to determine whether or not a tribal court had exceeded its jurisdiction. The Court, nevertheless, held that an exhaustion of tribal remedies is first necessary before the claims could be entertained by the Federal District Court.

These rules of construction, which disfavor federal or state intrusion into tribal civil jurisdiction, are especially compelling in light of the traditional view of interpreting the diversity jurisdiction statute strictly and nar-

rowly. See *Thomson v. Gaskill,* 315 U.S. 442 (1942); *City of Indianapolis v. Chase Nat'l Bank,* 314 U.S. 63 (1941).

Further, Congress's failure to address the conflicts of law problem, discussed above, is also strong evidence that it did not intend the general diversity statute to apply, when state courts would not have jurisdiction. See *Cohen,* 317-318, n.291 (1982). Thus, the evidence as a whole, clearly indicates that Congress did not intend the general diversity statute to be used to infringe on tribal self-government.

E. THE RATIONALE OF WOODS AND ERIE IS APPLICABLE TO THE PRESENT CASE

The rationale of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938) and *Woods v. Interstate Realty Co.,* 337 U.S. 535 (1949) is applicable to the present case. The Ninth Circuit correctly used the rationale as a partial basis for the denial of diversity jurisdiction when state courts would not have jurisdiction.

Petitioner, Iowa Mutual, argues that the *Erie* doctrine does not serve as an adequate justification for the refusal to exercise diversity jurisdiction. Its argument is based on its interpretation of the *Erie* lines of cases as being a means to "foster uniformity in the development of state laws." (Petitioner's Opening Brief, p. 7). While it is true that the *Erie* and *Woods* cases were based, in part, on the need to foster uniformity of development of state laws, they were also based on equally important policies of avoiding forum shopping and unequal protection of the laws to citizens of the forum state. These latter policies are clearly applicable to the present case. Iowa Mutual, however, fails to address them.

The policies of preventing forum shopping and unequal protection of laws were clearly a concern of the Court in the cases of *Erie* and *Woods. Erie* involved the issue of whether state law or federal common law applied to the liability of a railroad company for the injury caused by the negligent operation of its train to a pedestrian on a pathway on the railroad company's right-of-way. Prior to *Erie,* the Supreme Court had held that federal courts exercising jurisdiction on the grounds of diversity need not, in matters of general jurisprudence, apply the unwritten law of the state, as declared by its highest court. 304 U.S. at 71. Justice Brandeis, speaking for the Court, however, noted that this prior rule produced a number of "mischievous results." 304 U.S. at 74. The mischievous results which were of most concern were that the rule rendered equal protection of the law impossible and promoted forum shopping. He wrote:

> . . . The mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent the apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the rights should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. 304 U.S. 74-75.
>
> . . .

> In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizen jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another State, . . . 304 U.S. 76-77.

The Supreme Court's concern for unequal protection of the law and forum shopping was also noted in *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). In that case, a foreign corporation transacting business in the State of Mississippi without qualifying to do business, could not maintain a suit in federal court upon contracts entered into in such state, when such contracts would be unenforceable in state court. The Court observed that where a local citizen could not bring an action in state court, allowing an out-of-state citizen to bring a diversity action would discriminate against citizens of the state. The Court stated:

> [Prior authority requiring federal courts in a diversity case to apply state law] was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of an enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate. 337 U.S. at 538.

In the present case, the permitting of diversity jurisdiction, when a state court would not have jurisdiction, would promote the mischiefs of unequal protection of the laws and forum shopping discussed in *Erie* and *Woods*. Most tribal codes are patterned after federal regulations. 25 C.F.R. § 11.23 (1985). Often they require tribal courts to apply: (1) federal law, federal regulations, and ordinances or customs of the tribe not prohibited by federal law; and (2) in matters not covered by (1), the law of state in which the matter in dispute may lie. See generally, *Canby,* supra, at 216. Thus, tribal custom could have a sizeable effect on civil litigation. Indian customs and traditions may dictate different approaches than that which the state may use. *Chino v. Chino,* 90 N.M. 204, 206, 561 P.2d 476, 479 (1977).

As discussed above, it is questionable whether federal district courts would apply the state law or attempt to apply tribal custom. Even if they would attempt to apply the latter, it may be extremely difficult for them to do so in light of their limited experience in tribal customs and law, as opposed to state statutory and reported law. See *Santa Clara Pueblo,* 436 U.S. at 72, n.32. In this case, by permitting a foreign party to bring an action in a federal forum, when state court would not have jurisdiction, would discriminate against the citizen of Montana as well as promote intense jurisdictional battles. A citizen of the State of Montana would be required to bring the present action in tribal court, inasmuch as the Petitioner has admitted the state courts do not have jurisdiction. It would be incongruous to permit an out-of-state party to bring a diversity action in order to avoid the tribal court forum and to circumvent tribal substantive law when a state

citizen would be unable to do so. The rationale of *Woods* and *Erie* is therefore applicable to the present case. A federal court, sitting in diversity, should not have jurisdiction over a reservation Indian, when state court would not have similar jurisdiction.

F. THE EIGHTH CIRCUIT APPEARS TO BE BACKING AWAY FROM ITS POSITION IN POITRA

The Petitioner applied for a Certiorari in this case to resolve a conflict between the Ninth and Eighth Circuits. For the reasons discussed above the Respondents have taken the position that the Ninth Circuit holdings are correct on the matter. In addition to these reasons, however, it should be noted that there is good evidence that the Eighth Circuit is retreating from its position taken in *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974), cert. denied 421 U.S. 934 (1975).

In the very recent case of *Weeks Construction v. Oglala Sioux Housing Authority*, — F.2d — (8th Circuit No. 85-5129 and 85-5130, filed July 29, 1986), the Eighth Circuit was presented with a factual situation very similar to *R.J. Williams*. Both cases involved a construction company contracting to perform work for a tribal housing authority on reservations. Disputes arose between the construction companies and the housing authorities. The construction companies filed suit in federal district court, based upon diversity, to resolve the disputes.

As discussed above, the Ninth Circuit in *R.J. Williams* denied diversity jurisdiction on the grounds that diversity jurisdiction would infringe on tribal self-government and that the policy of *Erie v. Tompkins* and *Woods* do not permit a federal district court to take diversity where a state court does not have jurisdiction.

Interestingly enough, the Eighth Circuit, in *Weeks*, also declined to accept diversity jurisdiction, apparently for the same reasons. The Court noted the unique legal status of Indians and Indian tribes requires consideration of Indian sovereignty as a backdrop against which federal jurisdiction statutes must be read. *Weeks* Slip Opinion at 7. The Court also noted that this fundamental premise is applicable to federal courts as well as state courts absent governing acts of Congress. *Weeks* Slip Opinion at 9. The Court held that in light of this policy the assertion of diversity jurisdiction by a non-Indian against the Indian housing authority would constitute an infringement on tribal self-government. *Weeks* Slip Opinion at 10, n.7. In so ruling the Court specifically cited the case of *R.J. Williams* as authority. *Weeks* Slip Opinion at 7, 8, 9, 10, n.7.

It is also of interest to note that the Eighth Circuit cited *Woods* for the proposition that a federal court has original jurisdiction over civil actions, if the parties are of diverse state citizenship and *the Courts of the state in which the federal court sits can entertain a suit. Weeks* Slip Opinion at 7. In *Weeks*, neither party maintained that the dispute could be brought in South Dakota state court. *Weeks* Slip Opinion at 7, n.4.

Finally, the Court in *Weeks* specifically recognized, without rejecting, the criticism of commentators indicating that its position in *Poitra* was clearly wrong. *Weeks* Slip Opinion at 10, n.7. Although the Court indicated it need not discuss *Poitra's* correctness in that case, it would ap-

pear that the ruling in *Weeks* severely undercut the holding of *Poitra,* if it did not completely overrule it.

Thus, inasmuch as the Petitioners have agreed that the Ninth Circuit case of *R.J. Williams* was controlling in the present case, (App. to Pet., p. 5a) the Eighth Circuit's holding in the almost factually identical case of *Weeks* would indicate that there is no conflict between the Eighth Circuit's position the Ninth Circuit should be affirmed in the present case.

———o———

V. CONCLUSION

A federal district court does not have diversity jurisdiction over a case involving Indians and arising on the reservation, when a state court would not have such jurisdiction. In light of the history of tribal civil jurisdiction, Congress's policy of promoting tribal self-government, and the policies articulated by *Erie,* Congress did not intend for the diversity statute to infringe on tribal self-government. The Ninth Circuit Court of Appeals should be affirmed.

DATED this 25th day of August, 1986.

/s/ Joe Bottomly
P.O. Box A
Great Falls, Montana 59403
Attorney for Edward M. LaPlante
and Verla LaPlante